

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

SUNSTEEL, LLC,

Employer,

and

Case No. 19-RC-261739

**IRON WORKERS DISTRICT COUNCIL
OF THE PACIFIC NORTHWEST, AFL-CIO**

Petitioner.

**SUNSTEEL’S REQUEST FOR REVIEW OF
REGIONAL DIRECTOR’S DECISION AND DIRECTION OF ELECTION AND
REQUEST FOR IMMEDIATE STAY OF MAIL BALLOT ELECTION**

Pursuant to Section 102.67 of the National Labor Relation Board’s Rules and Regulations, SunSteel, LLC (“SunSteel” or “Company”) requests immediate review of the Decision and Direction of Election (“Decision”) issued by the Regional Director for Region 19 on July 21, 2020 in the above-captioned matter. The following compelling reasons require the National Labor Relations Board (“NLRB” or “Board”) to grant this Request for Review and *to immediately stay the distribution of mail ballots scheduled to commence on August 6, 2020, pursuant to the Decision.*

- The Decision presents a substantial question of law or policy because it presents a departure from officially reported Board precedent. *See S.D. Gas & Elec.*, 325 NLRB 1143 (1998).¹
- A substantial question of law or policy is raised because of the absence of officially reported Board precedent to support the Regional Director’s action that turns solely on the existence of COVID-19 in Yakima County generally and gives little weight to the Board’s preference for manual elections and the specific safety conditions at the plant or the implementation of safety measures to protect those involved in the election.

¹ On July 6, 2020, General Counsel Peter B. Rodd issued GC Memorandum 20-10 containing suggested manual election protocols and reiterating that “the Board has ultimate authority to make decision on when, how and in what matter elections are conducted. . . .” *See* GC Memo. 20-10, Attach. 1.

COVID-19 currently represents an understandable and reasonable concern. The instant Request for Review does not seek to gratuitously critique the Regional Director in navigating serious challenges during the current pandemic. At some point, however, the Board must reinstitute and reaffirm its precedents for representation proceedings and overturn a decision mandating mail ballots when the employer demonstrates that COVID-19 risk at a specific facility is minimal, employees in the voting group have continued to report to the facility every day, and the employer will institute all reasonable safety protocols, including those set forth in General Counsel Memorandum 20-10. This election offers that exact scenario. Notably, the Petitioner itself originally requested a manual ballot election on June 16, 2020, when it filed the petition.

As established below, the Regional Director abused his discretion by ordering a mail ballot election despite the substantial and effective safety protocols that would allow a safe manual election. The Regional Director's Decision represents an erroneous and unjustified departure from applicable NLRB law and policy and denies employees the right to participate in the NLRB's preferred election method that maximizes voter participation and free choice.

I. STATEMENT OF THE CASE

On June 16, 2020, the Iron Workers District Council of the Pacific Northwest, AFL-CIO ("Petitioner" or "Union") filed a representation petition to represent over a hundred employees at the Company's Sunnyside, Washington facility. The parties agreed to all terms for a stipulated election except the issue of manual vs. mail ballots. On July 16, 2020, the parties filed position statements regarding the appropriate election method. The Regional Director would only decide one issue: whether to conduct a manual or mail ballot election.

On July 21, 2020, the Regional Director issued the *Decision and Direction of Election* (see Attach. 2). In the Decision, while the Regional Director recognizes the strong preference for manual ballots, he then decides to order mail ballots solely on the general conditions of the

pandemic then present in Yakima County (not the specific circumstances at SunSteel's plant in Sunnyside, Washington, where the employees work). Thus, as the Regional Director opines:

Whether a mail ballot election is appropriate in this case requires considering both the public health concerns presented by the COVID-19 pandemic and the Board's stated preference for manual elections. Without addressing the specific statistics posited by the Employer regarding participation in mail ballot elections during the pandemic, I recognize that mail ballot elections may result in lower voter participation. I also recognize that the Board has at times in the past addressed potential problems that may be associated with mail ballot elections. While I do not discount these concerns, these concerns are the basis for the Board's traditional preference for manual elections, and absent the current pandemic I would order a manual election in this case because, as the Employer argues, employees are not "scattered." I only direct a mail ballot election here because of the extraordinary circumstances presented by the COVID-19 pandemic.

I find a mail ballot election is appropriate in this case because of the severity of the current pandemic in Yakima County. It is not hyperbole to state, when relative population is considered, Yakima County is the most severely impacted of Washington's 39 counties. Yakima County is one of only a few counties in Washington that was unable to progress out of phase 1 of reopening, and it remains a county subject to the strictest limitations on gatherings, social contact, and travel. While the current situation may not be as dire as a few weeks prior, when local hospitals exceeded their capacity, the point remains that COVID-19 is significantly impacting the residents of Yakima County and remains a serious health concern throughout the community. Here, directing a manual election would be to require a gathering of a relatively large group of voters in a community with widespread COVID-19 transmission. Indeed, based on the Governor's most recent order, it appears no more than 5 individuals should be congregating at any time.

Further, Washington in general is experiencing a trend of increasing COVID-19 infection. This increase raises the possibility that, if I order a manual election, I will be directing voters and others to congregate under circumstances more dire than those faced today. A mail ballot election avoids this risk. I additionally note that due to the distance from the Regional Office or Resident Agent, a manual election would require significant travel by the Board Agent conducting the election.

In finding that a mail ballot election is appropriate I do not rely on Petitioner's contention regarding the number of employees that have had COVID-19, or that the Employer shut down its facility for several days as a result. Unlike the statistics I have cited above, published by the State of Washington, I do not have a basis for assessing these specific factual contentions about the Sunnyside facility. If the question of whether to direct a mail or manual election were closer, it might be necessary to explore these specific facts further. However, given the severity of the outbreak in Yakima County generally, and because even the safest manual election still involves physical interactions, congregating, and an increased risk of

transmission, I find extraordinary circumstances are present that make a mail ballot election necessary.

Finally, I note that the General Counsel's "Suggested Manual Election Protocols" memo provides guidance on how to safely conduct a manual election when and if a manual election is deemed appropriate. It is not a checklist whereby a party is entitled to a manual election if it can meet these requirements. The manner of election is a question of discretion delegated by the Board to the Regional Directors. While I do not necessarily find fault with the Employer's proposal, procedures like social distancing and plexiglass shields are tools to mitigate the risk of transmission. When an area is experiencing the spread of pandemic disease to the extent of Yakima County simply mitigating the risk may not be the best course of action. I find in these circumstances it is appropriate to use the procedure that avoids the risks associated with in-person contact: the mail ballot procedure. Under the present circumstances I find it prudent to order a mail ballot election.

(See Attach. 2). While the decision talks generally about COVID-19 and its presence as of July 21 in Yakima County,² the Decision offers no explanation specific to the Employer's plant (where a full complement of employees are and have been working daily during the pandemic), or how the additional safeguards offered by the employer (not only all those provided in the GC's Memorandum, but also providing a covered outdoor tent for further ventilation) fail to suffice to ensure the safety of all involved in this particular election.

SunSteel acknowledges that Regional Directors have ordered and the Board has upheld mail ballots over the first few months of the pandemic. *See, e.g., id.; Victory Wine Group, LLC*, Decision and Direction of Election, No. 16-RC-257874, slip op. at 5-7 (Reg'l Dir., Apr. 23, 2020). However, the "extraordinariness" of COVID-19 has significantly diminished — it is part of daily life for employers, employees, unions and Board personnel. Indeed, the world has progressed such that the General Counsel has issued guidelines to conduct manual elections. For eligible voters, all of whom report to the Sunnyside facility every day, a manual election poses no additional risk.

² It should be noted that Yakima County is a very large county geographically — a total of 4,311 square miles in total. For the sake of comparison, it is larger than Delaware and Rhode Island combined, and nearly 80% the size of Connecticut (5, 543 square miles).

II. ISSUES

The principal issue in dispute is whether the Regional Director abused his discretion by ordering a mail ballot on the sole basis that COVID-19 exists.

First, the Regional Director's ultimate conclusion that a mail ballot is necessary to avoid physical interactions and congregating at the facility is factually and legally erroneous and contrary to NLRB precedent and GC Memorandum 20-10.

Second, it was an error for the Regional Director to order a mail ballot election based, essentially, solely on the unsupported belief that the Company could not implement an election procedure that ensured social distancing of six or more feet at all times.

Accordingly, the NLRB should grant review, vacate the Decision, stay the mail ballot election, and direct the Region to conduct a manual election.

III. BACKGROUND

SunSteel's facility at 2099 Sheller Road in Sunnyside, Washington, produces fabricated steel to frame all types of conventional and complex steel building structures, as well as stairs, rails, decking, and ornamental metals. The facility has continued to operate during the pandemic, only closing briefly the week prior to the July 4 holiday, then reopening and operating at normal capacity since then. All eligible voters report to work on a daily basis and work at the facility for the entire shift. All eligible voters are also currently scheduled to work on August 6, 2020, the day the Region will mail ballots. Furthermore, all eligible voters will work at the facility for their entire work shift.

Notably, the facility functions in accord with all guidelines of the Center for Disease Control ("CDC"). All of the following precautions (and others) are in place at the facility:

- Increased employee-wide communications regarding health and safety protocols;
- Additional cleaning resources and enhanced cleaning schedules to ensure sanitation;

- Additional cleaning supplies and sanitizers across the facility;
- High-touch surfaces repeatedly cleaned;
- Staggered and revised start, break, and lunch periods;
- Seating and/or common areas revised or closed;
- Physical markings on floors to maintain proper social distancing;
- Mandatory adherence to handwashing protocols;
- Provision and mandatory use of face masks; and
- Pre-shift screening procedures.

There have been no known work-related COVID-19 exposures at the facility for well-over five weeks (and even that one instance was inconclusive). Simply put, the Company has put its facility and employees in a safe position with strict, mandatory protocols.

IV. THE REGIONAL DIRECTOR'S FINDINGS

Without discussion of why the parties could not ensure the social distancing that eliminates the “physical interactions, congregating, and an increased risk of transmission” that the Regional Director sought to avoid, the Regional Director directed a mail ballot election. The Regional Director came to this conclusion even though an election would follow the same safety protocols already in place at the facility, which means, in fact, the existence of an election does not increase potential transmission rates at all because these interactions exist with or without the voters being able to participate in an election that maximizes voter participation. The assumption by the Regional Director that voting employees would “congregate” while voting, rather than follow a customary release schedule and observe social distancing, masking, and hygiene while standing in line, simply has no factual support or evidentiary basis.

Simply put, the Decision concedes that mail ballot elections depress employee participation, and, yet, still orders a mail ballot election. In essence, this decision runs roughshod over the Act's charge to protect employee choice by elevating a hypothetical safety risk already faced by employees and for which existing measures are in place and other measures are proposed (fully consistent with the GC Memo. 20-10). Indeed, if the Regional Director sought to protect

employee free choice, a manual election would occur because a manual election would not increase employee interaction or proximity or exacerbate COVID-19 concerns.

V. APPLICABLE LEGAL STANDARDS AND ANALYSIS

A. The Regional Director Erred in Ordering a Mail Ballot Election.

The Regional Director's actions rewrite Board precedent by misapplying the holding of *San Diego Gas & Electric* and the NLRB's *Casehandling Manual Part Two: Representation Proceedings* ("Casehandling Manual"), section 11301.2 ("Manual or Mail Ballot Election: Determination"). *San Diego Gas & Electric* establishes that Regional Directors should consider mail ballots in at least three situations: scattered voters, scattered schedules, and strike or lockout situations. The Board left open the possibility that other extraordinary circumstances may be relevant to election-type decisions. *S.D. Gas & Elec.*, 325 NLRB at 1145, n.6. Recently, Regional Directors have interpreted the "extraordinary" language to encompass the current COVID-19 pandemic. *See, e.g., Atlas Pacific; Victory Wine*. However, Regional Director decisions have frequently been devoid of any fact-specific analysis and, instead, reliant upon the fact that COVID-19 exists generally, as well as assumptions that employers cannot implement sufficient safety measures to ensure a safe manual election.

The refusal of Regional Directors to analyze unique case-specific factors misapplies Board precedent. Regional Directors should always analyze all of the factors that the Board has previously determined inform their discretion: employee free choice of representative, maximum voter participation, supervision of selection of representative, and voter safety at a particular location subject to additional relevant facts. Board precedent in representation cases rests upon the critical threshold consideration of which method of election best advances employee choice (voter turnout, ease of participation, etc.). Mail or mixed ballot voting only exists when necessary to "enhance the opportunity of all to vote." *Casehandling Manual*, section 11301.2. *San Diego Gas & Electric* stands

for the same: “[e]xtraordinary circumstances” mandating a mail ballot election may occur when the Regional Director “might reasonably conclude that [voters’] opportunity to participate in the election would be maximized by utilizing mail or mixed ballot election methods.” *Id.* at 1145. Specifically, a Regional Director must tie their exercise of discretion, even in cases of extraordinary circumstances, to the Board’s proper role in ensuring employee participation and free choice. *Id.* at 1145 n.10 (“A Regional Director should, and does, have discretion, utilizing the criteria we have outlined, to determine if a mail ballot election would be both more efficient and likely to enhance the opportunities for the maximum number of employees to vote.”).

B. Mail Ballot Elections Result in Reduced Voter Turnout.

Recent data definitively and empirically demonstrate that mail ballot elections significantly **diminish** turnout. During the week of March 7 to 13, 2020, more than 93% of manual ballots had a participation rate above 80% — only two out of thirty elections (6.7% of manual elections) resulted in lower rates. *See Wainfleet Co.*, No. 03-RC-256434 (63% rate); *Growing Seeds at Crystal Springs, Inc.*, No. 19-RC-256529 (75% rate). However, from March 14 to June 9, Regional Directors exclusively ordered mail ballot elections and ***nearly 40% of elections had a participation rate of 80% or less***. Indeed, COVID-19-related mail ballots have resulted in a very significant decrease in voter turnout compared to typical manual ballot elections. *See, e.g., Paragon Sys., Inc.*, No. 09-RC-259023 (55%); *River Mkt. Comm. Co-op* No. 18-RC-256986 (54%); *Univ. Protection Serv., LLC*, No. 10-RC-257846 (52%); *Triple Canopy, Inc.*, No. 27-RC-257463 (37%); *Am. Sec’y Programs, Inc.*, No. 05-RC-256696 (36%); *Children & Adult Disability Ed. Servs.*, No. 04-RC-256028 (40%).

Further, in *Fontanini Foods, LLC*, the Regional Director **twice** extended the mail ballot period because of low turnout. *Id.*, No. 13-RC-257636 (Reg’l Dir. June 29, 2020). In that case, the Region commingled ballots and counted on June 17, 2020. After low turnout, the Regional Director extended the initial mail ballot period until July 1, 2020. The Regional Director then extended the

period for a second time, until July 8, 2020, because only 227 of 401 (56.6%) mailed ballots had been returned as of June 29. Other issues also arose in that case, including: some employees had to pay to receive the NLRB package, missing ballots, duplicate ballots, and a few employees attempted to contact the NLRB but never heard back about ballot issues. Ultimately, the Region only tallied 216 ballots in that case (despite claiming to have had 227 as of June 29). All of these circumstances raise significant concerns as to the regularity and integrity of the election process – one of the hallmarks of the manual ballot process and its simple, transparent procedures. The Regional Director’s decision at best pays lip service to these concerns in noting that, under other circumstances, he would direct a manual election. But this does nothing for the employee voters in this case who are potentially disenfranchised with the Decision.

If voter turnout is of the utmost importance in representation cases, and the Board generally favors manual elections over mail ballot elections, the Board should overturn the instant Decision. Again, here, eligible voters come to work every day. These voters do not work from home. The state does not keep them at home on lockdown. To the contrary, it is undisputed that all voters report to the facility every day. Furthermore, election or no election, they will interact just as much and in just the same fashion. They should receive one the major quintessential protections of the National Labor Relations Act: a manual, secret ballot election.

C. The Regional Director Should Have Assessed Safety Specific to the Circumstances and Precautions at the Company’s Facility.

In its position statement, SunSteel detailed its commitment to ensure that it complied with all safety protocols outlined GC Memo. 20-10. To avoid any problems regarding air circulation, SunSteel further committed to conducting the election in a covered, outdoor venue that provides substantial space for social distancing and ventilation. Complying with all the safety protocols in GC Memo. 20-10 and conducting the election in an outdoor venue with sufficient social distancing,

SunSteel provided an environment that would allow employees to participate in the optimal voting scenario while doing nothing to increase the risk of COVID-19 transmission. In terms of safety, no reason existed to deny the request for a manual election.

Nonetheless, the Regional Director found the election would require “a gathering of a relatively large group of voters,” even though they work together every day and work together in the exact same setting. The Regional Director never explained, however, why this was the case. In that regard, social distancing procedures are already in place to allow people to come together in a safe manner, and there is no reason to believe they would not be observed while voting, just as they are while working, while on break, and while entering and leaving the facility. Indeed, the Company will continue to do what it can to enforce social distancing procedures, including reminding employees that, when going to the designated voting area, they should continue to observe such procedures. Likewise, a release schedule for each work area is typical in almost every representation election of any size under even normal circumstances, specifically to avoid large congregations of employees waiting to vote and the attendant problems that come with that. The Regional Director simply ignored this simple measure, widely used already, in basing his decision on “the possibility . . . [he] will be directing voters and others to congregate under circumstances more dire than those faced today.” The Board has never based its decisions on voting procedure on mere hypothetical possibilities of future negative circumstances, particularly where the risk of such circumstances can be significantly reduced with some basic mitigating measures and/or where it is equally or more plausible that a more favorable possibility exists.³

³ In that regard, the current published statistics of the Yakima County Health District show that COVID-19 cases are on a significant decline since peaking on June 1. Likewise, hospitalizations are now averaging fewer than 5 per day. See <https://www.yakimacounty.us/2410/COVID-19-Data-Dashboard>. Given current pandemic control measures in Yakima County, there is no reason to expect any reversal of those very positive trends.

The Regional Director’s decision ignored the specific safety situation and protocols at the plant and, instead, overly focused on the general state of the pandemic and hypothetical negative possibilities.⁴ At the same time, he gave little consideration to the most important factors that should decide the election method: employee free choice of representative, maximum voter participation, supervision of selection of representative, and voter safety. This was in error.

D. The Decision Violates Current Board Election Jurisprudence and is Inapposite to NLRB General Counsel’s Memorandum 20-10.

The Board reactivated election proceedings in an April 17, 2020, announcement entitled “COVID-19 Operational Status,” stating, “[c]onsistent with their traditional authority, Regional Directors have discretion as to when, where and if an election can be conducted, in accordance with NLRB precedent.” A total of at least four elections were held in-person following the lifting of the election moratorium – there has been no report of any problems with any such election. For example, in Byhalia, Mississippi, Hearthside Food Solutions LLC workers successfully voted in person without issue. *Hearthside Food Solutions LLC*, Case No. 15-RC-258901 (Region 15 June 3, 2020). There, the parties agreed to implement several safety measures, including erecting plexiglass barriers to separate workers, board employees, and election overseers; using disposable pens and pencils; marking off spaces at 10-foot intervals; providing masks and gloves; and separating the entrance and exit so workers would not pass each other.

With the experience of these elections, and the benefit of a variety of health information regarding the pandemic, on July 6, 2020, the Board’s General Counsel, Peter B. Robb released GC

⁴ Worth noting is that there is no finding by the Regional Director that the general impact of COVID-19 on Yakima County has not negatively impacted the reliability and security of mail service. Given the well-documented problems that exist on normal circumstances with mail ballots, the potential aggravating impact of COVID-19 on those typical problems with delivery and return of ballots cannot be dismissed. On the other hand, manual ballots take all those problems off the table by cutting out all intermediate points of potential failure.

Memorandum 20-10 on “Suggested Manual Election Protocols.” (See GC Mem. 2010). GC 20-10 outlines numerous election protocols to ensure a safe election. *SunSteel committed to comply with all the procedures listed. The Company went one-step further offering to conduct the election in an open air tent to further decrease any concerns of COVID-19 transmission. The Company will implement every suggestion in the GC Memo practicable, and will work with both the Region and the Petitioner regarding any additional concerns.*

In light of these facts, the Regional Director’s actions fail to follow precedent or the guidance of GC Memo. 20-10. Simply put, the Regional Director rejected a manual ballot without any case-specific justification. The false presumption that social distancing cannot occur during an election is insufficient to support the instant Decision. Other Regions have successfully operated manual elections subject to social distancing procedures. See, e.g. *Hearthside Food Solutions LLC*, No. 15-RC-258901. There is no good reason that cannot be done here.

E. The Board Should Issue An Immediate Stay of Mail Ballot Distribution.

The Decision indicates that the Region will distribute mail ballots on August 6, 2020. In order to prevent potential voter confusion and irreparable injury to the election process, the Board should grant review and issue an immediate stay of mail ballots in this case.

VI. CONCLUSION

The Decision fails to follow established Board precedent, national labor policy, and recent General Counsel guidance. Though Regional Directors have some discretion when determining the manner of elections, mere reference to speculative buzzwords and phrases such as “COVID-19,” “risk of transmission,” “physical interactions,” “serious health concern,” do not justify choosing an election method that depresses voter turnout and impairs employee free choice. Any decision to use a mail ballot must assess the facts and concerns specific to the election at-hand – which was not done here. For all such reasons, SunSteel respectfully

requests that the Board grant review, vacate the instant Decision, stay the mail ballot election, and order a manual ballot election.

Respectfully submitted:

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 28th day of July, 2020, the above and foregoing document was served filed via the NLRB's electronic filing portal and served by electronic mail to the following:

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